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No. 08-518

Supreme Court, U.S.
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In The
Supreme Court of the United States

HASHMEL C. TURNER, JR.,

Petitioner,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, in his official capacity as Mayor of the City of Fredericksburg, Virginia,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

Petitioner Hashmel C. Turner, Jr., pursuant to Rule 15 of the Rules of the Supreme Court, files this supplemental brief to alert the Court to the recent decision of the United States Court of Appeals for the Eleventh Circuit in Pelphrey v. Cobb County, Georgia, No. 07-13611, 2008 WL 4710693 (11th Cir. Oct. 28, 2008). In Pelphrey, certain taxpayers sued the County Commission and the Planning Commission of Cobb County, Georgia, alleging that these governing bodies violated the Establishment Clause by permitting clergy who offered legislative prayers at Commission meetings to include references to deities, including Jesus Christ, in their prayers. The district court ruled that the prayers (for the most part) did not violate the Establishment Clause, and the Eleventh Circuit affirmed.

This decision matters for two reasons: 1) The Eleventh Circuit has created a circuit split, because, in stark contrast to the Fourth Circuit's holding in this case, the Eleventh Circuit acknowledged that the decision in Lee v. Weisman, 505 U.S. 577 (1992), and specifically that portion of Lee holding that it is no business of government to compose official prayers, applies in the legislative prayer context; and 2) The Eleventh Circuit recognized, in effect, that a policy attempting to differentiate between "sectarian" and "nonsectarian" prayer – or, in this case, "denominational" and "nondenominational" prayer – is a futile (and unconstitutional) task, a conclusion the Fourth Circuit completely sidestepped in the decision below by creating the artificial (and

misguided) construct that legislative prayer is government speech.

1. The Eleventh Circuit Recognized that Lee v. Weisman Applies in the Legislative Prayer Context.

Turner argued at the Fourth Circuit that the City Council's prayer policy mandating "nondenominational" prayers violated the Establishment Clause because this Court held in Lee v. Weisman that the government may not prescribe or proscribe the content of an official prayer. The Fourth Circuit, however, rejected Turner's argument and refused to apply Lee because it held that Lee is limited to the school prayer context and does not apply to legislative prayer.

The Eleventh Circuit disagrees. In Pelphrey, the court extensively discusses this Court's ruling in Lee v. Weisman and asserts that, along with Marsh v. Chambers, 463 U.S. 783 (1983), it represents, in effect, controlling authority for courts analyzing the constitutionality of legislative prayer policies. Pelphrey, p. 14 ("Marsh, as informed by Allegheny and Lee, controls our review of the constitutionality of legislative prayers.")[1] The Eleventh Circuit specifically quoted Lee for the following principle: "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by

[1] Citations are to the pages of the Eleventh Circuit's slip opinion.

government.'" Id. (citations omitted). The Eleventh Circuit also recognized, contrary to the rationale for the City's policy and the Fourth Circuit's implicit ruling below, that:

> To read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer "is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one . . . faith or belief." Id. at 794–95, 103 S. Ct. at 3337–38. . . . The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they are wrong.

Pelphrey, p. 15-16.[2]

If the Fourth Circuit had followed the same approach, it likely would have concluded that the City Council's prayer policy – which *prescribes* "nondenominational" prayer and, in effect and as applied, *proscribes* any references to Jesus Christ – violates the Establishment Clause. It did not so hold, however, and now there exists a clear split between these two circuits on the proper analytical

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[2] The Eleventh Circuit also held that, under the Establishment Clause, government cannot purposefully discriminate among religious beliefs in the selection of persons giving prayers. Pelphrey, p. 40. In the present case, the Fourth Circuit upheld the application of a policy purposefully adopted and applied to exclude Councilor Turner from praying based on his beliefs.

role of this Court's decision in Lee v. Weisman and, more specifically, whether the rule announced in Lee even applies in the legislative prayer context. Given the fundamental – indeed "cornerstone" – Establishment Clause principles announced in Lee, this split represents a significant development in legislative prayer jurisprudence. See Pelphrey, p. 33 ("The federal judiciary has no business 'in compos[ing] official prayers for any group of the American people to recite as a part of a religious program carried on by government ....'") (quoting Lee v. Weisman, 505 U.S. at 588).

In addition to the reasons set forth in Turner's petition, the Court should grant review to resolve this circuit split.

2. The Eleventh Circuit Recognized that Deciding Where to Draw the Line Between Sectarian and Nonsectarian Prayer is Virtually Impossible.

Turner also argued at the Fourth Circuit that the City Council's "nondenominational" prayer policy is unconstitutionally vague and overbroad. The Fourth Circuit did not address this portion of his argument because it concluded, erroneously, that legislative prayer is "government speech."

While the Eleventh Circuit did not have occasion to engage the "government speech" debate, it did address the monumentally difficult task faced by government officials trying to determine whether a prayer contains sectarian references. Here is what

the Eleventh Circuit said about the capacity of government to decide essentially theological issues:

> We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard. Even the individual taxpayers cannot agree on which expressions are "sectarian." Bats, one of the taxpayers, testified that a prohibition of "sectarian" references would preclude the use of "father," "Allah," and "Zoraster" but would allow "God" and "Jehovah." Selman, another taxpayer, testified, "[Y]ou can't say Jesus, . . . Jehovah, . . . [or] Wicca . . . ." Selman also deemed "lord or father" impermissible. The taxpayers' counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. ... The difficulty experienced by taxpayers' counsel is a glimpse of what county commissions, city councils, legislatures, and courts would encounter if we adopted the taxpayers' indeterminate standard. As the taxpayers' counsel conceded at oral arguments, "the line is not completely bright between sectarian and nonsectarian."

Pelphrey, pp. 16 – 18. The Fourth Circuit's decision, however, gives legislative bodies license to undertake the precise line drawing that the Eleventh Circuit found so difficult to accomplish. And it did so by holding that legislative prayer is "government speech," an unprecedented construct never before recognized by this Court.

In addition to the reasons set forth in Turner's petition, this Court should grant review to address the standardless discretion and inappropriate government entanglement with religion inherent in the City Council's "nondenominational" prayer policy, which is unconstitutionally vague and overbroad.

CONCLUSION

For these reasons and those set forth in Turner's original petition, the Court should grant review and reverse the Fourth Circuit's decision below.

Respectfully submitted,

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